STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner/Appellant,

v

Russell G. Slade, P24726,

Respondent/Appellee.

Case No. ADB 150-89

Decided: September 30, 1991

BOARD OPINION

The hearing panel determined that the respondent had neglected a legal matter entrusted to him by a client and failed to file timely answers to two requests for investigation. In a separate matter, the panel found that the respondent was informed of the death of a client whom he was representing in a personal injury case but deliberately failed to disclose that fact to the tribunal in order to gain a tactical advantage. The hearing panel issued an order suspending the respondent's license to practice law in Michigan for 119 days. That order is the subject of a petition for review filed by the grievance administrator who argues that the panel erred in dismissing certain charges of professional misconduct contained in the formal complaint and that the discipline imposed by the panel is insufficient. In accordance with MCR 9.118(A), petitions for review have also been filed by complainant Frank Bruni and by the respondent.

The grievance administrator's motion for the dismissal of the respondent's petition for review was filed June 7, 1991 on the grounds that the respondent had failed to file a supporting brief as directed by the Board. That motion was taken under advisement, to be addressed by the parties at the review hearings held on July 18, 1991. The respondent has not filed a brief nor has he filed an answer to the grievance administrator's motion for dismissal of his petition for review. The respondent's petition for review has been dismissed. Based upon its review of the whole record, the Attorney Discipline Board has concluded that the findings and conclusions of the panel with regard to the charges of misconduct have ample evidentiary support and that they should be affirmed. It is the Board's further conclusion, however, that the nature of the established misconduct warrants a substantial increase is discipline. The respondent's license to practice law in Michigan shall be suspended for three years and until reinstatement in accordance with the provisions of MCR 9.123(B) and MCR 9.124.

The allegations in Count I of the complaint arise out of the respondent's retention by client Frank Bruni to further the prosecution of a civil action which had already been instituted in the State of Wisconsin.

At that time, respondent Slade was engaged in the practice of law in Ironwood, Michigan with attorney Sandra S. Schultz. A separate complaint against Ms. **Schultz, ADB 149-89,** contains a similar count against her arising out of her representation of Mr. Bruni. The complaints against respondents Slade and Schultz were consolidated for hearing before a hearing panel in Bessemer, Michigan. In both cases, the hearing panel concluded that the respondents' inaction in the Bruni matter, for a period of approximately eighteen months, constituted neglect within the meaning of Canon 6 of the Code of Professional Responsibility which was then in effect, specifically DR 6-101(A). In both cases, the grievance administrator has appealed the panel's findings that the charges of misconduct under Canon 7, DR 7-101, had not been established. For the reasons set forth in the Board's opinion issued August 23, 1991, in Matter of Sandra S. Schultz, ADB 149-89, we affirm the panel's findings that the respondent's neglect of a legal matter on behalf of Frank Bruni did not violate the provisions of Canon 7, DR 7-101(A)(1-3). As we stated in that opinion, that subrule directs that a lawyer shall not "intentionally" fail to seek a client's legal objectives, fail to carry out a contract of employment or prejudice a client during the course of the professional relationship. In considering the panel's findings, the Board must determine whether, "[u]pon the whole record, there is proper evidentiary support." In re DelRio, 407 Mich 336; 285 NW2d 277 (1977). Applying that standard, we agree that the essential element of intent was not established as required by DR 7-101(A)(1-3).

The same standard of review has been applied to our consideration of the hearing panel's decision to dismiss Count III of the complaint and that decision has been reviewed for proper evidentiary support on the whole record. See In re Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982). In its decision to dismiss Count III, the panel reported that it had listened carefully to the testimony of the sole witness presented by the grievance administrator and that the testimony of that witness, on "(e)very issue of importance" was not credible. On issues of credibility, the Board has stated:

> The hearing panel receives evidence in the first instance and has the opportunity to judge . . . credibility. The hearing panel's finding of fact should be given deference whenever possible. Schwartz v Walsh, DP 16/83, Opinions of the Board p. 333 '(1983).

Although dismissal of this count was raised in the administrator's petition for review, the supporting brief filed June 5, 1991 concedes that the grievance administrator does not challenge the panel's ruling on the credibility of that witness. We find no other basis upon which to challenge the panel's dismissal of that count.

Similarly, the Board has reviewed the record with regard to the panel's findings that the allegations in Count V(F)(i,iii,iv,v) were not established by the evidence. We agree with the panel's findings on those issues.

Count V of the complaint charged that the respondent filed a personal injury lawsuit on behalf of a client in the United States District

Court for the Western District of Michigan, Northern Division. While that case was pending, the respondent's client died. It appears that the respondent filed a Notice of Death with the court approximately 61 days after his client's death. It is also clear, however, that the respondent appeared at a mediation hearing and failed to disclose this crucial fact to the mediation tribunal or to the opposing party. In its report, the panel stated:

> Mr. Slade admits that he knew precisely what he was doing, and in fact had made a conscious choice not to advise the tribunal. He testified that he believed that disclosing the death of his client would result in a lower mediation award . . .
>
> The panel concluded that defendant was materially prejudiced. Failure to disclose was acknowledged to have been motivated by a fear that disclosure would reduce the amount of the mediation award. Not only does Mr. Slade's testimony to that effect acknowledge his intent to deceive, it is verification of his knowledge that there would be a material prejudice to the defendant in the form of an increased award if there were no disclosure of death . . .
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> Finally, the court was materially prejudiced. The panel very strongly felt that the integrity of the mediation system and proceedings, the time and effort, money expended in connection with the mediation went for naught.
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> The mediation was not a valid exercise without full knowledge. The panel felt that Mr. Slade's conduct adversely affected the process. The panel believes that the legal process itself was degraded irreparably by Mr. Slade's mendacity.

The Board is concerned by the respondent's neglect of a legal matter and his failure to file timely answers to two requests for investigation, as alleged in Counts 1, 11 and IV, especially in light of his prior reprimand for failure to file timely answers to three other requests for investigation. (Matter of Russell G. Slade, ADB 95-89, Board Opinion May 7, 1990). Based upon these acts alone, the Board might well have considered an increase is the level of discipline sufficient to require reinstatement in accordance with MCR 9.123(B) and MCR 9.124.

We agree, however, with the panel's characterization of the charges under Count V as “the most grave” and it is this misconduct, which in the Board's opinion, warrants the substantial level of discipline which we impose in this case.

The seriousness of misconduct involving deliberate misrepresentations is reflected in prior opinions of the Attorney Discipline Board increasing the level of discipline imposed by a hearing panel. In Matter of Mary E. Gerisch, ADB 171-87; 197-87, ADB Opinion April

28, 1988, for example, the Board considered the appropriate sanction where an attorney manufactured a false settlement check and settlement statement in support of a false claim to a client and the Attorney Grievance Commission that a case had been settled. In that case, the Board vacated a hearing panel order suspending the respondent's license for three years and ordered that the respondent's license be revoked, noting that:

> Our legal system depends, in large part, upon the assumption that lawyers as officers of the court, are telling the truth when they make statements about the cases they are handling. Matter of Gerisch, supra, p. 3.

In another case, Matter of Leo C. Gilhool, ADB 155-88, ADB Opinion June 28, 1989, the Board increased a suspension of nine months to a suspension of three years in a case involving the attorney's deliberate misrepresentation to his client, aided by the presentation of fictitious documents.

In both of those cases, the Board cited an opinion issued by the Supreme Court of Pennsylvania ordering the disbarment of an attorney found to have fabricated client consent forms. The court stated, “Truth is the cornerstone of the judicial system and the practice of law requires an allegiance and a fidelity to truth.” (Office of Disciplinary Counsel v Wittmaack, J-245-1986, Pennsylvania Supreme Court, March 11, 1987.)

It is the violation of that duty, the obligation to tell the truth when dealing with tribunals, which prompts our decision to increase discipline. While fabrication of documents was noted as an especially aggravating factor in the cases cited above, it would be difficult to argue that deliberate concealment of a material fact from a tribunal should be viewed as substantially less egregious if the attorney is able to accomplish the objective without the aid of supporting documents.

Concurring--John F. Burns, George E. Bushnell, Jr., Remona A. Green, Hanley M. Gurwin, Linda S. Hotchkiss, M.D., and Theodore P. Zegouras

Elaine Fieldman did not participate in this matter.